

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based)	
Services to Rural Areas and Promoting)	WT Docket No. 02-381
Opportunities for Rural Telephone)	
Companies)	
To Provide Spectrum-Based Services)	
)	
2000 Biennial Regulatory Review)	WT Docket No. 01-14
Spectrum Aggregation Limits)	
For Commercial Mobile Radio Services)	
)	
Increasing Flexibility To Promote Access to)	WT Docket No. 03-202
and the Efficient and Intensive Use of)	
Spectrum and the Widespread Deployment of)	
Wireless Services, and To Facilitate Capital)	
Formation)	

To: The Commission

REPLY COMMENTS OF THE BLOOSTON LAW FIRM

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Dated: January 26, 2004

SUMMARY

A consensus of commenters in this proceeding agree with the Blooston Rural Carriers that the FCC should define the term “rural” in a way that is easy to understand and to administer. For purposes of spectrum licensing, the RSA is the most appropriate definition and MSA/RSA licensing should be used for licensing one or more spectrum blocks in all future auctions. A majority of commenters also agree that counties having population density of 100 persons or fewer per square mile should also be considered “rural.”

The Blooston Rural Carriers agree with NTCA that a “keep what you use” approach should be used to reclaim unused spectrum only when it is part of a larger geographic area license (such as an MTA or larger). Otherwise, the FCC should focus its efforts on providing market-based incentives and regulatory relief that is targeted to carriers that actually provide service in rural areas. In this regard, the FCC should move forward with its proposal to create a substantial service “safe harbor” based on the provision of rural service; and it should adopt a “very rural area” safe harbor that would apply where the BTA or RSA market has a population density of 10 persons or less per square mile. In these remote areas, which pose unique economic and technical challenges, operation of facilities that provide coverage to 15% of the service area population should be deemed sufficient to achieve “substantial service.”

Commenters also urge the FCC to explore allowing higher power limits and to permit greater technical flexibility for licensed and unlicensed wireless systems deployed in rural areas, so long as adequate safeguards are in place to protect the integrity of existing services.

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REPLY COMMENTS OF THE BLOOSTON LAW FIRM

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (“Blooston”), on behalf of its clients listed in Attachment A hereto (the “Blooston Rural Carriers”) and pursuant to Rule Section 1.419 of the Commission’s Rules, hereby submits reply comments to the Notice of Proposed Rulemaking in the above-captioned proceeding regarding the modification of the Commission’s policies and rules to facilitate the provision of spectrum-based services to rural areas and promoting opportunities for rural telephone companies to provide spectrum-based services.¹

In these reply comments, the Blooston Rural Carriers elaborate on just those issues that warrant further discussion, based on the record in this proceeding.

¹ See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies, *Notice of Proposed Rule Making*, WT Docket No. 02-381, WT Docket No. 01-14, WT Docket No. 03-202, FCC 03-222 (*rel.* October 6, 2003) (“*Notice*”).

I. Definition of “Rural”

The *Notice* requests input on how the term “rural” should be defined, for use in conjunction with each of the policies adopted in this proceeding.² On this issue, the Blooston Rural Carriers agree with CTIA and the Rural Cellular Association who favor a flexible, two-part definition for “rural” that includes areas that either (i) fall within an RSA, or (ii) are in counties with a population density of 100 persons or fewer per square mile.³ The RSA is familiar to the Commission and licensees; it is easily understood and administered because RSAs are based on fixed county boundaries; and licensing wireless services based on an RSA model would ensure that wireless facilities are constructed and operated in rural areas. For these reasons, the RSA is the most appropriate definition of “rural” for purposes of spectrum licensing, and MSA/RSA licensing should be used for licensing one or more spectrum blocks in all future auctions. However, to more accurately target rural areas for purposes of operational requirements and regulatory initiatives, and to address NTCA’s concerns that the FCC not adopt a policy that is over-inclusive or under-inclusive for simplicity’s sake,⁴ the Blooston Rural Carriers agree that the Commission should adopt an alternative definition for “rural area” that is based on population density. In this regard, there appears to be a general consensus among rural advocates and others that counties with a population density of 100 persons or fewer per square mile should be considered “rural.”⁵

² *Notice* at ¶ 10.

³ Comments of CTIA at pp. 3-4; Comments of Rural Cellular Association at pp. 2-3 (advocating the use of RSAs for purposes of spectrum licensing, and the use of RSAs and any county with a population density of 100 persons per square mile or fewer for purposes of operational requirements).

⁴ Comments of NTCA at p. 5.

⁵ *See, e.g.*, Comments of the Blooston Law Firm at p. 17; Comments of CTIA at pp. 3-4; Comments of OPASTCO/RTG at p. 3; Comments of Rural Cellular Association at pp. 2-3.

As discussed below in conjunction with the Commission’s proposal for a substantial service “safe harbor,” the Blooston Rural Carriers urge the Commission to adopt a further definition for “very rural” areas to account for the extraordinary challenges of providing wireless services to smaller markets (*e.g.*, BTAs and RSAs) that have population densities of 10 persons per square mile or less. Adopting a “very rural” category is in the public interest because it would give the Commission a mechanism to more precisely target the incentives, regulatory relief and other rural initiatives that it adopts as part of this proceeding.

II. Improved Access to Unused Spectrum

The *Notice* seeks comment on a variety of means by which the Commission may promote access to and efficient use of spectrum in rural areas, ranging from allowing voluntary arrangements that move spectrum and licenses between users to establishing regulatory mechanisms by which the Commission reclaims and re-licenses unused spectrum.⁶ In this regard, the Commission seeks comment on what constitutes “use” of spectrum, and on the pros and cons of re-licensing versus market-based mechanisms.

A. What Constitutes “Use” of Spectrum

On the issue of how the FCC should define “use” in order to effectively promote access to and use of spectrum in rural areas, the Blooston Rural Carriers and all others addressing this issue have indicated that the Commission should retain its traditional baseline standard for “use” as reflecting the construction and operation of specified facilities by the licensee.⁷ These commenters also support modification of this standard

⁶ *Notice* at ¶ 13.

⁷ *See, e.g.*, Comments of the Blooston Law Firm at p. 7; Comments of NRTC at p. 6; Comments of Rural Cellular Association at p. 6; Comments of Southern LINC at p. 5; Comments of WCA at p. 9.

as proposed by the FCC in response to the establishment of secondary spectrum markets.⁸ In other words, spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as “used” for the purposes of any performance criteria that the Commission adopts.⁹ As WCA correctly notes, “the overriding objectives of the Commission’s secondary markets policy would be defeated if wireless licensees are penalized at renewal for engaging in exactly the sort of spectrum leasing transactions that secondary markets are designed to promote.”¹⁰ Moreover, this proposed regulatory treatment is consistent with the Commission’s existing MDS/ITFS rules.¹¹

In addition, to further promote access to and use of spectrum in rural areas and to remove potentially significant barriers faced by rural licensees who may be forced to rely upon a spectrum lessee’s construction in order to meet license build-out requirements, the Blooston Rural Carriers urge the Commission to use this proceeding to announce a policy of regulatory flexibility when considering system construction extension requests arising from the failure of an unrelated lessee to live up to its contractual obligation. Complete license forfeiture in this context would be unfair to a licensee/lessor that has made its rural spectrum available to others on the secondary market, as intended by the Commission, as well as to rural customers who rely on the licensee (or its other lessors) for service.

⁸ Comments of the Blooston Law Firm at p. 7; Comments of NRTC at p. 6; Comments of Rural Cellular Association at p. 6; Comments of Southern LINC at p. 5; Comments of WCA at p. 9.

⁹ Notice at ¶ 20.

¹⁰ Comments of WCA at p. 9.

¹¹ *Id.*

B. Re-Licensing vs. Market-Based Mechanisms

The *Notice* also seeks comment on when, and under what circumstances, the FCC should use re-licensing as a means to increase access to spectrum.¹² Licensed spectrum may be returned to the Commission due to non-use under a “complete forfeiture” standard, as applied to PCS licensees, or under a “keep what you use” standard, as applied to cellular licensees. Once this spectrum is reclaimed, the Commission may then re-license it via competitive bidding, as with PCS licenses, or it may use a non-auction mechanism such as the cellular unserved area re-licensing rule.

The initial comments were divided as to the wisdom of the re-licensing approach, with AT&T Wireless, Dobson Cellular, Nextel Partners and CTIA opposing any rule that would result in the forfeiture of spectrum not currently used by the licensee,¹³ and others, including OPASTCO/RTG and the Rural Cellular Association, advocating that the unserved area licensing process be extended to PCS and other radio services.¹⁴

This division of opinion only serves to illustrate the fact that re-licensing presents a double-edged sword for rural carriers.¹⁵ On the one hand, it could be a useful tool to “free up” unused rural spectrum from large market area licenses, where the licensee is generally able to meet its construction and performance requirements by extending service only to large metropolitan areas, and where the licensee may have no incentive or plans to extend service to high cost rural areas. On the other hand, re-licensing poses

¹² *Notice* at ¶ 20.

¹³ Comments of AT&T Wireless at p. 7; Comments of Dobson Communications Corp at pp. 14-15; Comments of Nextel Partners at pp. 5, 14-16; Comments of CTIA at p. 9 (finding the “complete forfeiture” model used in PCS to be more appropriate than a “keep what you use” model).

¹⁴ *See* Comments of OPASTCO/RTG at pp. 4-5 (“keep what you use” provides incentives for carriers to either build-out in rural areas or hand the spectrum to entities ready, willing, and able to provide such service); Comments of Rural Cellular Association at p. 3.

problems when applied to smaller geographic area licenses, such as BTAs and RSAs, because it creates a significant disincentive to carriers that want to focus their efforts on extending service to niche markets or to sparsely populated areas.¹⁶ Such a result would be contrary to the public interest and the numerous policy goals that lie at the heart of this proceeding.

To avoid problems such as those outlined above, the Blooston Rural Carriers agree with NTCA that the “keep what you use” approach should be used to reclaim unused spectrum only when it part of a larger geographic area license (such as an MTA or larger).¹⁷

Another way that the Commission can avoid the difficult issues raised by re-licensing is by focusing its efforts primarily on incentives and other market-based mechanisms to make rural spectrum available. In this regard, numerous commenters suggested that rural spectrum deployment would be best facilitated by the FCC’s adoption of incentives and reduced regulatory burdens.¹⁸ Commenters also pointed to the Commission’s Secondary Markets proceeding and urged the Commission to eliminate barriers to the effective functioning of the marketplace.¹⁹ The Blooston Rural Carriers believe that adoption of financial and regulatory incentives, and reduced regulatory burdens, would be the most effective and appropriate way to encourage licensees (and

¹⁵ Comments of the Blooston Law Firm at pp. 9-11.

¹⁶ *Id.*

¹⁷ Comments of NTCA at pp. 10-11.

¹⁸ *See, e.g.*, Comments of AT&T Wireless at pp. 2, 9-10 (credits for the return of underutilized spectrum); Comments of UTStarcom at p. 10 (recommending a “significant discount on regulatory fees: or a bidding credit that could be used in a future spectrum auction). Comments of Blooston Law Firm at 11 (suggesting that the FCC adopt a variety of regulatory and financial incentives to promote geographic license partitioning and/or long-term lease arrangements with carriers that serve rural areas).

¹⁹ Comments of Cingular Wireless at p. 4.

spectrum lessees/lessors) to use their rural spectrum or to transfer their rights to those who are more willing and better positioned to provide rural service.

III. Performance Requirements

A wide variety of commenters support the Commission's proposal to adopt a "substantial service" alternative for wireless services that are licensed on a geographic area basis.²⁰ As CTIA correctly notes, the addition of this construction requirement "will provide carriers in rural areas a greater incentive and ability to raise necessary capital and to construct facilities and provide services that are situated to the needs of the rural area."²¹ The addition of a substantial service option will harmonize the construction requirements across all services,²² and it will increase the likelihood that not all will serve the same population centers.²³ Taken together, these outcomes will allow holders of 30 MHz C-Block PCS licenses in rural areas to provide the same niche services and to concentrate on the provision of service to sparsely populated areas, just like their counterparts holding 15 MHz C-Block and 10 MHz D-, E- and F-Block licenses. In this regard, with 5-year construction deadlines fast approaching for many rural PCS licensees, the Blooston Rural Carriers have urged the Commission to issue an interim order as soon as possible so that rural PCS licensees will have a meaningful opportunity to benefit from the Commission's revised policies and rules.²⁴

²⁰ Comments of the Blooston Law Firm at pp. 16-17; Comments of CTIA at pp. 4-6; Comments of NRTC at pp. 3-5; Comments of Rural Cellular Association at pp. 8-9; Comments of WCAI at pp. 7-8.

²¹ Comments of CTIA at p. 5.

²² *Id.*

²³ Comments of Rural Cellular Association at p. 8.

²⁴ Comments of the Blooston Law Firm at p. 16.

Numerous commenters also support the Commission’s proposal to adopt a substantial service “safe harbor” based on provision of rural service.²⁵ Indeed, CTIA suggests that it might be appropriate to have two safe harbors for substantial service in rural areas. For mobile wireless services, the safe harbor would be met through the provision of coverage, through construction or lease, to at least 75 percent of the geographic area of at least 20 percent of the “rural” counties within its licensed area. For fixed wireless, the safe harbor would be met if a licensee, through construction or a lease, constructs at least one end of a permanent link in at least 20 percent of the “rural” counties within its licensed area.²⁶ The Blooston Rural Carriers support CTIA’s proposals. However, in order to make the concept of a “safe harbor” truly meaningful for licensees in rural BTA and RSA markets where the geographic area of counties are vast and population densities are far below 100 persons per square mile, the Blooston Rural Carriers urge the Commission to adopt a “very rural area” safe harbor that would apply where the population density of the licensed service area (*e.g.*, the RSA or the BTA) is less than 10 persons per square mile. In these remote areas, which pose unique economic and technical challenges, operation of facilities that provide coverage to 15% of the service area population should be deemed sufficient to achieve “substantial service.”

To preserve incentives for licensees of large geographic markets to extend wireless networks to rural areas or to make their rural spectrum available to others who are willing and able to do so, the Blooston Rural Carriers support NTCA’s suggestion

²⁵ Comments of CTIA at p. 5; Comments of Rural Cellular Association at p. 9.

²⁶ Comments of CTIA at p. 5.

that the “substantial service” option should be viewed as appropriate only when spectrum is licensed according to small license areas.²⁷

The vast majority of commenters in this proceeding believe that the imposition of additional performance requirements in subsequent license terms is not appropriate.²⁸ Accordingly, the FCC should not seek to impose such requirements. Cingular Wireless correctly notes that altering licensee build out obligations after an auction would undermine auction integrity and would wreak havoc on the business plans of small carriers.²⁹ As discussed above, commenters in this proceeding believe that a variety of regulatory incentives, rather than additional requirements, are the best way to promote additional buildout once the minimum coverage benchmarks have been met.

IV. Relaxed Power Limits

Many commenters support the concept of allowing increased power levels for rural telecommunications systems, so long as the Commission adopts appropriate interference safeguards and so long as relaxed power limits do not undermine the integrity of existing mobile services.³⁰ Given the remoteness of most rural areas from major markets, the Blooston Rural Carriers continue to believe that it should be feasible for the Commission to create such safeguards. Accordingly, the FCC should move quickly to explore allowing higher power limits and greater technical flexibility for wireless systems deployed in rural areas. The record also reflects that the Commission

²⁷ Comments of NTCA at pp. 10-11.

²⁸ Comments of AT&T Wireless at pp. 6-7; Comments of Cingular at pp. 7-8; Comments of CTIA at p. 6; Comments of Dobson Communications Corp at pp. 14; Comments of Nextel Partners at pp. 17-18; Comments of Rural Cellular Association at p. 9; Comments of Southern LINC at pp. 8-10.

²⁹ Comments of Cingular at p. 7.

³⁰ Comments of CTIA at pp. 9-10; Comments of Nextel Partners at p. 19; Comments of NRTC at pp. 5-6; Comments of OPASTCO/RTG at pp. 6-7; Comments of Rural Cellular Association at p. 10).

should also explore allowing higher power for Part 15 unlicensed devices in rural areas, so long as such operations are limited to spectrum that is set aside for unlicensed operations.

V. Appropriate Size of Geographic Service Areas

While the Commission received a variety of suggestions on the issue of geographic license area size, all of the smaller wireless carriers and rural advocates participating in this proceeding have agreed that the availability of smaller geographic licenses is the most effective way to ensure that wireless services are extended to rural areas.³¹ These comments made suggestions for the Commission to adopt a presumption in favor of using small license areas, since this would force the industry and the FCC to consider the needs of rural communities whenever spectrum is licensed;³² to set aside at least one spectrum block for every auction to be licensed on an MSA/RSA basis;³³ to use MSAs and RSAs as the basis for all licenses offered in auctions;³⁴ and to establish the county as the minimum geographic license area for future auctions.³⁵ While allocating all licenses on an MSA/RSA basis or using even smaller license areas would certainly increase opportunities for small and rural carriers to obtain spectrum in FCC auctions, a majority of small and rural carriers appear to agree with CTIA and others who favor a balanced approach for new spectrum blocks that mixes combinations of larger geographic

³¹ Comments of the Blooston Law Firm at pp. 20-22; Comments of NTCA at pp. 6-8; Comments of OPASTCO/RTG at pp. 7-11; Comments of Rural Cellular Association at pp. 11-12.

³² Comments of NTCA at pp. 6-8

³³ Comments of the Blooston Law Firm at pp. 20-22; Comments of OPASTCO/RTG at p. 8

³⁴ Comments of Rural Cellular Association at pp. 11-12.

³⁵ Comments of Southern LINC at pp. 10-11; *See also* Comments of UTStarcom at pp. 11-13 (suggesting that licensing by single counties would make it easier for carriers to provide service in rural areas if they are unwilling or unable to served the named city in a BTA).

service areas with smaller geographic areas.³⁶ Using a mix of geographic licenses in all auctions and ensuring that at least one spectrum block in each auction is allocated on an MSA/RSA basis would provide opportunities for large carriers and small carriers alike. It would also preserve economies and reduce transaction costs for nationwide and larger regional carriers. Using license areas that are smaller than RSAs could make participation in FCC auctions difficult for small carriers and might encourage speculation on licenses in remote counties by bidders that do not have the resources or the intention to provide a high quality of service to the public. Instead of allocating licenses on a county-by-county basis, the Commission should stick to MSAs and RSAs as the smallest unit, and encourage licensees to make their unused spectrum available on the secondary market.

³⁶ Comments of CTIA at p. 11;

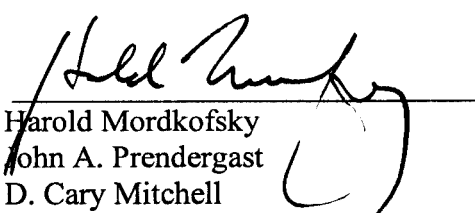
CONCLUSION

To ensure meaningful rural telephone company and small business participation in the provision of spectrum-based services in rural areas, and to encourage the rapid deployment of advanced telecommunications services in rural America, the Blooston Rural Carriers respectfully urge the Commission to adopt policies and rules as outlined herein, and in its initial comments.

Respectfully submitted,

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ATTACHMENT A

A list of the rural telephone companies, cooperatives, entrepreneurs and rural telco subsidiary companies that comprise the “Blooston Rural Carriers” is provided below.

- Allcom Communications, Inc.
- Alliance Communications Cooperative, Inc.
- Arvig Communications Systems
- CC Communications
- Dickey Rural Services, Inc.
- Golden West Telecommunications Cooperative, Inc.
- Interstate Telecommunications Cooperative, Inc.
- James Valley Telecommunications
- Kennebec Telephone Company
- McCook Cooperative Telephone Company
- Midstate Communications, Inc.
- Midvale Telephone Exchange, Inc.
- Montana Wireless, Inc.
- North Dakota Network Company
- Park Region Mutual Telephone Company
- Polar Communications Mutual Aid Corporation
- PVT Networks, Inc.
- Red River Rural Telephone Association, Inc.
- Rothsay Telephone Company
- Santel Communications Cooperative
- South Slope Cooperative Telephone Co., Inc.
- 3 Rivers Telephone Cooperative, Inc.
- Valley Telecommunications Cooperative Association, Inc.
- Venture Communications, Inc.
- Webster Calhoun Cooperative Telephone Association
- West River Cooperative Telephone Company

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